IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/12/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1887 of 1991

R.Chinnadurai ... Appellant

-Vs-

S.Rajalakshmi ... Respondent

The above Second Appeal is directed U/sec.100 of C.P.C. as stated therein.

!For Appellants : Mr.R.T.Doraisami

^For Respondent : Mr.A.K.Kumarasamy

:JUDGMENT

This Second Appeal is directed against the judgment and decree dated 29.3.1990 rendered in A.S.No.47 of 1990 by the Court of Additional District Judge, Erode thereby reversing the judgment and decree dated 15.4.1988 rendered in O.S.No.878 of 1987 by the Court of District Munsif, Sathyamangalam.

2. Tracing the history of the above second appeal coming to be preferred, what comes to be known is that the defendant is the appellant herein and the respondent herein has filed a suit for specific performance against the appellant in O.S.No.878 of 1987 on the file of the Court of District Munsif, Sathyamangalam praying for a decree directing the defendant to execute and register a sale deed for Rs.14,50 0/= over the plaint schedule properties in favour of the plaintiff, for delivery of possession and for costs on averments such as that the defendant is the owner of a site measuring 160 feet East-West and 7 0 feet North-South (5.00.5 Hect.) in S.F.86/1; that on 11.12.1981, the defendant had agreed to sell a common half share in the plaint schedule properties to the plaintiff for a total consideration of Rs.14,500/=; that an agreement of sale was executed and as per the terms and conditions, the defendant receiving a sum of Rs.14,000/- in cash as advance and as part of sale price on 11.12.1981 itself and agreed to execute a registered sale deed in favour of the plaintiff within two years from 11.12.1981 on receipt of the balance sale consideration of Rs.500/-; that in case the plaintiff fails to perform her part of the contract within the agreed period, the defendant shall be entitled to forfeit the advance of Rs.14,000/-;

that if the plaintiff is ready and willing to pay the balance of Rs.500/- and demand execution of sale deed and if the defendant fails to do so, the plaintiff would be entitled to file the suit for specific performance and get necessary relief; that the defendant had signed the agreement in the presence of an attestor and the attestor attested the document in the presence of the plaintiff, the defendant and the scribe.
3. The further case of the plaintiff is that she had been always ready and willing to perform her part of the contract of sale dated 11.1 2.1981, but the defendant had been delaying to perform his part of contract on some pretext or other; that on 26.11.1983 the plaintiff sent a legal notice to the defendant demanding the execution of a registered sale deed; that though he received the notice, the defendant did not send any reply; that since the defendant had not come forward to execute the sale deed as agreed, the plaintiff has filed the suit praying for specific performance further depositing the balance of sale consideration of Rs.500/- into Court by means of a lodgment.

4. In the written statement filed by the defendant, besides generally denying the allegations of the plaint, he would further specifically allege that it is utter falsehood to state that on 11.12.1981 at Sathyamangalam he had agreed to sell a common half share in the plaint schedule properties to the plaintiff to a total cash consideration of Rs.14,500/-; that it is equally false to state that the defendant had signed the agreement in the presence of the attestor and the attestor attested the document in the presence of the plaintiff, the defendant and the scribe; that he never signed any paper before the attestor and scribe; that moreover, he never saw the plaintiff so far; that the terms and conditions stated in the alleged agreement dated 11.12.1981 are highly imaginary and suspicious; that this defendant never executed any agreement on 11.12.1981; that the defendant purchased the suit property along with the other half share from one T.R. Sulochana Ammal for Rs.29,000/- and since he did not have enough money at that time, he approached the plaintiff's husband S.K.Subramaniam who is close friend of the defendant; that by pledging the plaintiff's jewels at Sathyamangalam Cooperative Urban Bank Limited, he raised loan for a sum of Rs.20,000/- and paid to the defendant; that as a security for repayment of the loan by the defendant to the plaintiff's husband, the alleged agreement of sale came into existence; that it represents only loan transaction; that on 11.1.1982, the defendant paid Rs.2 0,000/- to the plaintiff's husband, besides paying interest to the Urban Bank ; that within a day or two after 11.1.1982, the plaintiff's husband represented that he would return the alleged agreement of sale after redeeming the jewels, but he failed to do so; that due to the recent enmity, he utilised the alleged agreement to file this frivolous suit; that the agreement, under these circumstances, is not enforceable; that it is usual to fix up time for months only for performance of the contract; that the very fact that the suit agreement is alleged to be for a period of two years is also an indication of the fraudulent nature of the agreement set up by the plaintiff; that the plaintiff has no cause of action against this defendant. On such averments the defendant has prayed to dismiss the suit with costs.

5. The trial Court, based on these pleadings, would frame two issues and two additional issues as follows for determination of all the questions

which are involved in the whole suit:

(1)Whether the plaintiff is entitled to the relief of specific performance?
(2)What relief, is the plaintiff entitled to?
Additional issues:
(1)Whether the sale deed dated 11.12.1981 is true and whether it is binding on the defendant?
(2)Whether it is true that the defendant did not enter into any agreement dated 11.12.1981?

Thereupon, the trial Court would allow the parties to record their evidence, both oral and documentary, wherein on the part of the plaintiff she would not only examine herself as P.W.1, but also would examine one other witness namely Jafarullah for oral evidence as P.W.2, besides marking four documents as Exs.A1 to A4 for documentary evidence, Ex.A1 dated 11.12.1981 being the sale agreement executed by the defendant in favour of the plaintiff for a sum of Rs.14,500/-, Ex.A2 dated 26.11.1983 being the lawyer's notice to the defendant, Ex.A3 dated 29.11.1983 being the postal Acknowledgement card and Ex.A4 dated 5.12.1983 being the reply notice issued by the defendant's lawyer to the plaintiff's lawyer.

6. Likewise, on the part of the defendant he would examine himself as D.W.1 for oral evidence in confirmation of his case put up counter to the plaintiff's case, no documentary evidence would be marked on the part of the defendant.

7. The Trial Court, having traced the facts and circumstances of the case and in appreciation of all the evidence placed on record in the context of the facts and circumstances of the case put up by the plaintiff and the defence case placed on record, has ultimately dismissed the suit with costs, testifying the validity of which the plaintiff has preferred an appeal in A.S.No.47 of 1990 on the file of the Court of District Judge, Erode and the said Court also having traced the facts and circumstances as put-forth by parties before the trial Court and the other aspects relevant for consideration would frame its own points for determination of the appeal viz.:
(1)Whether the sale agreement is true and sustainable?
(2)Whether the defendant is liable to execute the sale deed as per the agreement?

Thereupon, the appellate Court, in appreciation of the facts pleaded and the circumstances brought-forth and the evidence placed on record by the trial Court, would allow the appeal thereby reversing the findings of the trial Court, further directing the defendant to execute the sale deed within a period of three months. Aggrieved by the said judgment and decree, the defendant has now come forward to prefer the above second appeal on certain grounds as pleaded in the grounds of appeal and this Court has admitted the above second appeal for determination of the following substantial question of law:-

"Whether Ex.A1 is admissible in evidence in the absence of examining the available attesting witness, when the execution of Ex.A1 was denied by the

defendant as per Sec.68 of the Evidence Act?"

8. During arguments, the learned counsel appearing on behalf of the appellant/defendant, besides having elaborately brought forth the facts and circumstances of the case as pleaded, would ultimately stick to the legal point that it is a case wherein no attesting witness has been examined but only the scribe has been examined as a witness by the plaintiff and while the case of the plaintiff is that he did not sign the agreement, nor execute the sale agreement, the appellate Court has no reason to differ from the decision of the trial Court. The learned counsel would further submit that even though one Palanisamy, the attesting witness is available, he was not examined by the plaintiff and would hasten to add that Ex.A.1 agreement is a forged one; that Ex.A.1 is not at all an agreement; that all the conditions are only against the vendor; that if it is a genuine one, then it would have been signed by both. On such arguments, the learned counsel for the appellant would pray to set aside the judgment of the first appellate Court and restore that of the trial Court.

9. On the contrary, on the part of the respondent/plaintiff, the learned counsel would cite two judgments respectively reported in (1) 1 998-3-L.W.189 (LAKSHMI AMMAL (DIED) AND 6 OTHERS vs. J.VICTOR AND 3 OTHERS and (2) 1999(I) CTC 36 (SUBBAMMAL vs. MASANAMUTHU THEVAR AND OTHERS).

10. So far as the first judgment cited above is concerned, in a case of similar facts and circumstances wherein the plaintiff has not signed the said document therein as per Section 15(a) of the Specific Relief Act and it is the argument of the plaintiff that since he was not a party to the agreement, the suit filed on the basis of Ex.A.1 could not be maintained, the learned single Judge of this Court would extract from 'A Treatise on the Specific Performance of Contracts' by The Rt.Hon.Sir Edward Fry G.C.B. to the effect that "the statute requiring that the agreement, or the Memorandum or note thereof, shall be signed by the party to be charged therewith, or his agent, and not requiring that it shall be signed by both parties to the contract, it has been held, both in Courts of Equity and also in Common Law Courts, that a signature by the party against whom the contract is sought to be enforced is sufficient." Based on the above observations of the learned Author, the learned single Judge having observed that the said observation squarely supports the contention of the respondents therein, would hold that there is no infirmity in the suit filed by the plaintiff on the basis of Ex.A.1.

11. In the second judgment cited above also, another learned single Judge of this Court, in a case wherein the vendee has filed the suit to enforce the agreement of sale and the agreement containing a ' mark' in the place for the vendee's signature, the vendee examining himself as a witness

and further examining the scribe and attestor to prove the agreement, the learned Judge has held that the ingredients of agreement to sell have been established and that the agreement was valid and enforceable.

12. Citing the above judgments, the learned counsel for the

respondent would exhort that agreements of sale need not be attested; that the defendant is not disputing the execution but says that the same was executed for a loan transaction and that subsequently he discharged the loan and therefore the agreement was not enforced; that the trial Court dismissed the suit on grounds that (1) the attestor of the document was not examined and therefore the execution of Ex.A.1 is not proved (2)that in Ex.A1, the signature is different even from sheet to sheet; (3)that only the defendant has signed not the vendor and therefore the agreement is not enforceable, but the appellate Court reversed the finding and decreed the suit against which the defendant has preferred the second appeal; that the defendant admits Ex.A.1 but attributes different reason for the same having come into existence; that the trial Court says that attestation is necessary for a Will under Section 63 of the Indian Succession Act; that for a mortgage under Section 59 of the Transfer of Property Act, it should be attested by two witnesses; that for gift under Section 123 of the Transfer of Property Act, it has to be attested and without attestation, the document is invalid.

13. Regarding the proof of the document, the learned counsel would point out Section 68 of the Evidence Act and would submit that even oral agreement is enforceable. On such arguments, the learned counsel for the respondent would pray to dismiss the above appeal.

14. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, it comes to be known that it is the defendant who is the appelant herein and the respondent/plaintiff has filed the suit in O.S.No.878 of 1987 in the trial Court for specific performance praying for a decree directing the defendant to execute and register the sale deed for a sale consideration of Rs.14,500/= on the plaint schedule properties, for delivery of possession and for costs wherein the suit property is a site measuring 160x70 on ground that the defendant agreed to sell the common half share in the plaint schedule property to the plaintiff for a total consideration of Rs.14,500/= and Ex.A.1 agreement for sale was executed; that the defendant had received a sum of Rs.14,000 /= in cash as advance and agreed to execute the sale deed within two years from the date of execution on receipt of balance consideration of Rs.500/= and it is this document which is marked as Ex.A.1 dated 1 1.12.1981.

15. The defendant would deny the averments based on which the suit is registered by the plaintiff stating that the mere execution of the averments of the Ex.A.1 was true but it was not true to the facts and circumstances of the case but for different purpose and the said purpose was over and the defendant was not liable to pay anything to the plaintiff but with an avaricious mind, the plaintiff forging the signatures of the defendant underneath has unreasonably come forward to file the suit and therefore would seek to dismiss the suit.

16. The trial Court, having framed the issues and conducting the trial with due opportunity for parties to be heard, would ultimately arrive at the conclusion to hold that Ex.A.1 was unreliable, based on which no relief could be given thus ultimately dismissing the suit with costs.

17. On appeal, the appellate Court, framing its own points, would reverse the judgment of the trial Court and it is this reversed judgment of the lower appellate Court which is being challenged in the above second appeal on certain grounds as brought forth by the appellant in the memorandum of appeal. This Court, at the time of admission of the above second appeal has formulated the substantial question of law, which is extracted at the end of para No.7 supra.

18. A careful study of the subject, a close perusal of the evidence placed on record, both oral and documentary, having regard to the other materials placed on record and upon hearing the learned counsel for both, if the said substantial question of law framed has to be answered adhering to the facts and circumstances of the case as projected before the trial Court in evidence, a close perusal has to be had into Ex.A.1 which would tell tales of its coming into being that it has been reduced into writing in Tamil in two stamped papers of Rs.2/= and Rs.0.50 respectively which form part of the first two pages and these two pages have been written in manuscript and the third and fourth pages are typed in which the gaps are filled up with relevant particulars, particularly the sale consideration, the advance amount, the time granted etc. The sale consideration has been fixed at Rs.14,50 0/= out of which it is recited therein that a sum of Rs.14,000/= has been given in advance on that day itself and within two years, on payment of the balance sum of Rs.500/=, the plaintiff was to get the registration of the sale done in his favour and it is in the form of not an agreement but some undertaking by the defendant in favour of the plaintiff in which the signatures of the defendant alone are seen, the plaintiff particularly not signing.

19. An agreement must have two parties and both are to sign the same. Only then it is an agreement. For this basic necessity, there may be exceptions under exceptional circumstances as it has been advocated on the part of the Courts and the case in hand is not falling under the exceptional cases. Why the plaintiff has not signed the papers is not made clear. It is stated that the defendant volunteered to give it in favour of the plaintiff whereas it is patently revealed that the signatures of the defendant at each and every page differs and it could be patently seen. No mention need be necessary, those signatures have absolutely no connection with the signatures put by the defendant appearing before the Court for deposing evidence as D.W.1. Therefore, under these circumstances, the genuineness of Ex.A.1 has to be proceeded with in the context of the legal requirements for such a document particularly in the absence of any attesting witness being examined as a witness in spite of the sole witness being alive, but the plaintiff has chosen only the scribe to be examined.

20. Now, adhering to the substantial question of law, it has become necessary on the part of this Court to examine the admissibility of Ex.A.1 in evidence in the absence of examining any available attesting witness in the wake of denial of the same by the defendant as per Section 68 of the Indian Evidence Act. Section 68 of the Indian Evidence Act recites:

68.Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

PROVIDED that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

21. The first requirement of the Section is that it must be proved that the document in issue requires attestation in which event at least one attesting witness must be examined to prove its execution in the event of the attesting witness being alive and capable of giving evidence. For this general requirement, which is mandatory, there is also an exception when the document is not a Will, which has been registered in accordance with the provisions of the Indian Registration Act unless the execution of the same is specifically denied.

22. In the case in hand, it has to be ascertained at the outset as to what type of document is Ex.A.1, whether it is a declaration by the defendant since it bore only the signature of the defendant or is it an agreement wherein both parties must agree to the proposals and conditions and signed the document in the presence of the witnesses. Since the nature and character of this document has not been ascertained, the lower Courts have taken for granted according to their whims and fancies either treating the same as an agreement or otherwise which is not the correct method which has to be ascertained. So far as the trial Court is concerned it has discredited the document and disbelieved the version of the plaintiff and has arrived at the conclusion to hold that the plaintiff had not filed a true case particularly when he has come to the Court seeking the relief of specific performance in which event he is expected to come with clean hands. Therefore, disbelieving the version of the plaintiff and discrediting the coming into being of the Ex.A.1, the trial Court has ultimately dismissed the suit with costs.

23. But, the first appellate Court, having done the patch-up work, doing a research into what are all not necessary in making out a document, forgetting the fact that positively it should have assessed as to the necessary aspects which are essential for making out a document and has allowed the appeal filed by the plaintiff. Therefore, it must be said that the first appellate Court has indulged in unwarranted exercises in stuffing the frog to imitate a buffalo.

24. Basically, many questions have gone unanswered such as the necessity for an advance amount of Rs.14,000/= to be paid from out of the sale consideration of Rs.14,500/= and for the rest of the meagre amount of Rs.500/= to be paid and getting the sale deed registered in favour of the plaintiff, a time of two years being granted. All these are not only improbable but unbelievable as well which could occur only in the event when possession of the property is being handed over to the intended purchaser without which, in the normal circumstances, such a thing cannot happen at all.

25. Having on the background these and many such improbabilities, if this Court has to arrive at a conclusion in the above second appeal answering the sole substantial question of law framed, it should be spelt out that Ex.A.1 is neither an agreement nor could it be taken as a genuine document enforceable in law and the lower appellate Court has committed grave injustice

in approving the same as genuine and an enforceable instrument and therefore the only conclusion that this Court could arrive at in the above circumstances on a overall consideration of the entire case in the light of the substantial question of law is to allow the above second appeal setting aside the judgment and decree of the first appellate Court and hence the following decision.
In result,
(i) the above second appeal succeeds and the same is allowed.
(ii)The judgment and decree dated 29.3.1990 rendered in A.S.No.47 of 1990 by the Court of Additional District Judge, Erode is set aside and the judgment and decree dated 15.4.1988 rendered in O.S.No.878 of 1 987 by the Court of District Munsif, Sathyamangalam is restored.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes

gr/Rao

To

1.The Additional District Judge,
Erode.

2.The District Munsif,
Sathyamangalam.

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